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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

OCT 26 2010

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Khew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner submitted a motion to reopen/reconsider that the director granted. The director then denied the motion on May 9, 2008. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software telecom industry company.¹ It seeks to employ the beneficiary permanently in the United States as a senior systems software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree in information technology. In his denial of the petitioner's motion the director stated that the petitioner's assertion that it has the right to look at any acceptable qualification in hiring, including any combination of education, training or experience that is suitable and acceptable by the employer did not conform to the minimum requirements of the requested classification. The director again noted that the beneficiary did not have the required bachelor's degree in information technology.

On appeal, counsel asserts that the even though the beneficiary does not have a master's or bachelor's degree in information technology, she nonetheless meets the qualifications listed on the labor certification because she has the substantial equivalent of a Master's degree in Information Technology. Counsel states that this equivalency is based upon the beneficiary's six year medical degree, which is more than a four year bachelor's degree, in addition to more than five years of work in the information technology field. Counsel refers to section 14 of the certified labor certification that states "any suitable combination of education, training or experience is acceptable."

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

¹ The AAO notes that the petitioner filed a subsequent I-140 petition under the advanced degree or alien with exceptional ability on June 28, 2008 with the Texas Service Center. The record indicates that this classification based on a Notice of Intent to Deny was changed to a skilled worker classification and the petition was subsequently approved on December 17, 2008.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The beneficiary possesses a foreign medical degree from the [REDACTED], Department of Medical Cybernetics and Biophysics, Moscow, Russia.³ We must consider whether the beneficiary's medical degree is the foreign equivalent of a U.S. Master's degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The AAO notes the petitioner provided the beneficiary's Diploma with Honors dated June 29, 1993 that states the beneficiary completed the whole course of the [REDACTED], Moscow, Russia, with a specialization in biophysics and that based on the State examination board dated [REDACTED] and her transcripts for twelve semesters of university-level study. The diploma states the beneficiary is qualified as a physician-cybernetics.

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a

professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, an advanced degree in an unrelated field combined with five years of experience in a relevant field will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."⁴ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). In the instant matter, the beneficiary possesses a post secondary degree six years in length that is equal to or greater than a baccalaureate degree from a U.S. college or university.

⁴ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

With the I-140 petition, the petitioner submitted three evaluation reports. The first report entitled "Educational Evaluation Report" is written by [REDACTED] American Evaluation and [REDACTED]. In his report, [REDACTED] states that based on the addendum to the beneficiary's diploma issued by the Russian State Medical University on [REDACTED], the beneficiary's education in Russia is the equivalent of the U.S. Degree of Doctor of Medicine awarded by a U.S. regionally accredited college or university. The second report, entitled "Professional Work Experience Evaluation Report," is dated [REDACTED] and written by [REDACTED] School of Information Technology, [REDACTED]. [REDACTED] states that the beneficiary's education and over five years of responsible professional work experience in the field of information technology are equivalent to a U.S. Master's degree of Information Technology awarded by a U.S. regionally accredited college or university.

The third document contained in the record is a Hebrew language certificate with English translation dated [REDACTED] written by [REDACTED] from the Ministry of Education and Culture, [REDACTED] and Academic Diplomas, State of [REDACTED]. This certificate states that the beneficiary's diploma from the Russian State Medical University is equivalent to a second academic (master) degree among the academic degrees accepted in [REDACTED]. Since this third document does not establish any educational equivalency to a U.S. master's or bachelor's degree, the AAO will not discuss this document further in these proceedings as it has no probative value.

The AAO notes that the [REDACTED] evaluations examine distinct parts of the beneficiary's curriculum vitae. The first report examines the beneficiary's medical degree, while the second combines his medical degree and work experience to determine that the beneficiary has the equivalent of a U.S. master's degree in information technology.

In determining the equivalency between the beneficiary's medical degree and U.S. higher education, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

With regard to the post secondary education system in Russia, EDGE notes that the *Diplom spetsialista* in architecture, law, or medicine (six years) represents attainment of a level of education comparable to a first professional degree in architecture, law, or medicine in the United States. The *Diplom spetsialista* in other fields (five years) represents attainment of a level of education comparable to a master's degree in the United States. Thus, the AAO would determine the

beneficiary's medical degree (based on twelve semesters of studies and a state medical examination) to be the equivalent of a medical degree in the United States and an advanced degree for purposes of the EB2 advanced professional visa preference classification.

Because the beneficiary does have a specialized advanced degree that is equivalent to an "United States advanced degree," the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act as she does have the minimum level of education required by the certified ETA 9089.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See *Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. See *id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a master’s degree in information technology degree is the minimum level of education required. Line 6 reflects that twelve months of work experience in the proffered position is also required. Lines 8-A,B and C, indicate that an alternate combination of a bachelor’s degree⁵ with five years of work experience is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable, and that the job title of the acceptable alternate occupation is programmer, software engineer or related occupation. Section 14 indicates that “any suitable combination of education, training, or experience is acceptable.”

On appeal, counsel refers states that this language on the certified ETA Form 9089 means that even though an applicant may not have the required degree, the applicant may use ANY suitable combination of education, training or experience to qualify for the position. (Emphasis in original.) Counsel states that the director failed to acknowledge that this language is in the labor certification and therefore the beneficiary does have the specific requirements that is needed for the position. Counsel also states that the beneficiary’s degree is more than a bachelor’s degree and therefore should satisfy the requirements.

The AAO notes that the language contained in Section 14 (commonly known as the *Kellogg* language) refers to Section 656.17(h)(4) of the PERM regulations that provides:

- (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
- (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer’s alternative requirements, certification will be denied unless the application states that any suitable

⁵ The AAO notes that the petitioner did not designate an alternate field of study for the master’s degree at line H-7. Thus, the petitioner requires either a U.S. master’s degree in information technology and one year of work experience or a baccalaureate degree in information technology with five years of work experience.

combination of education, training, or experience is acceptable.

This section of the PERM regulations is based on the Board of Alien Labor Certification Appeals (BALCA) holding in the pre-PERM case of *Francis Kellogg*, 1994-INA-465 (Feb. 2, 1998) (en banc). In *Kellogg*, the Board held that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are considered to be unlawfully tailored to the alien's qualifications, unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. In *Federal Insurance Co.*, the BALCA panel found that no evidence or explanation had been presented as to why it was essential for the *Kellogg* language to appear on Form 9089, other than to act as a legally binding acknowledgement or attestation by a petitioning employer that it followed the *Kellogg* requirement. BALCA held that, "because the existing Form 9089 does not reasonably accommodate an employer's ability to express this attestation, we hold that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089."

The panel also noted that the current Form 9089 very clearly did not include a Section that even suggests that it would be the correct place to write the Kellogg attestation, or that Section 14 would be the correct place to place the Kellogg language. The panel notes that while the regulation explicitly requires that the PERM application include the Kellogg language where it applies, there is not effective notice to the public on how to comply with the requirement. While the USCIS is not bound to the findings of the BALCA panel, it does find their reasoning with regard to the placement of the *Kellogg* language on the ETA Form 9089 to be of guidance. Further USCIS has consulted with the DOL pursuant to its statutory consultation authority at 8 C.F.R. § 204(b). The DOL position is that the placement of the Kellogg language on the ETA Form 9089, based on the *Federal Insurance* decision, does not reduce the actual minimum requirements below a bachelor degree -- DOL would interpret the language as permitting alternatives to a bachelor degree that are equivalent to a bachelor degree. Thus, the *Kellogg* language would supplement the primary and alternative requirements but would not lower the educational bar further. In the instant matter, the petitioner would still need to establish that the beneficiary possesses a U.S. Master's degree or equivalent foreign degree in information technology or a U.S. baccalaureate degree or equivalent foreign degree in information technology with five years of work experience.

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a doctorate degree⁶ in medicine from the [REDACTED] in Russia. In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Diploma with Honors dated [REDACTED] that states the beneficiary completed the whole course of the Russian State Medical University, having specialized in [REDACTED] and that based on the State examination board dated [REDACTED] the beneficiary is qualified as a [REDACTED]. The record also contains a one page transcript of the beneficiary's twelve

⁶ As stated previously, the beneficiary possesses a medical degree, and not a doctorate degree in medicine.

semesters of medical studies at the [REDACTED], Moscow. The AAO notes that the beneficiary's transcript does not identify any specific coursework in information technology during the six years of her university-level studies, although course number 29 on her transcript, identified as programming, and course number 32, identified as system analysis and the automated control systems in healthcare, may have had some theoretical relationship to information technology. The overwhelming majority of the beneficiary's coursework is in the field of medicine. Thus, the beneficiary's academic qualifications do not meet the criteria stipulated in the certified ETA 9089; a master's degree in information technology or a bachelor's degree in information technology with five years of work experience.

The beneficiary does have an advanced degree based on her medical degree; and, thus, does qualify for preference visa classification under section 203(b)(2) of the Act. However, the beneficiary does not meet the job requirements on the labor certification. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.